In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-852

STEVEN ZATSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-933

SCOTT LEISNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After the denial of their motions to dismiss the indictment on the ground that it was founded on an unconstitutional statute, petitioners pleaded *nolo contendere* in the United States District Court for the Southern District of Florida to one count of a multi-count indictment charging violations of 21 U.S.C. 841(a)(1), part of the Comprehensive Drug

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Abuse Prevention and Control Act of 1970. Petitioner Zatsky's plea was to Count I (Pet. App. 4) charging conspiracy to possess and sell $88,000 worth of cocaine. Petitioner Leisner's plea was to Count IV (Pet. App. 9), charging possession of cocaine with intent to distribute. Each was sentenced to a prison term of fifteen months, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioners' sole contention here, as below, is that the Drug Abuse Act is unconstitutional because it does not require proof in each case that the acts alleged have a nexus with interstate commerce. The identical contention was rejected by the Fifth Circuit in its thorough opinion in *United States* v. *Lopez*, 459 F. 2d 949, certiorari denied, October 10, 1972, *sub nom. Llerena* v. *United States*, No. 72–103, on which the court below relied in this case.[1] As we pointed out in our Memorandum in Opposition in *Llerena*, the constitutional question is similar to the one advanced unsuccessfully in *Perez* v. *United States*, 402 U.S. 146, where this Court reaffirmed prior rulings that the Commerce Clause can reach wholly intrastate activities which, as a class, have a substantial effect upon interstate commerce. There is no constitutional requirement in such circumstances that a connection with interstate commerce be shown in each case.

The statutory scheme which includes 21 U.S.C. 841 deals in a comprehensive way with matters having a

[1] The Sixth Circuit recently reached the same conclusion. *United States* v. *Scales*, 464 F. 2d 371, 373–376.

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profound effect upon interstate commerce—the manufacture, possession, and distribution of narcotics and other dangerous drugs. Congress so determined and stated in its formal findings set forth in 21 U.S.C. 801; those findings were rationally based on "statistical reports and extensive testimony as to the extent of the drug traffic and the unauthorized use of drugs." *Lopez, supra,* 459 F. 2d at 953.[2]

[2] Petitioners' assertion (Zatsky Pet. 8–9; Leisner Pet. 7) that there was no discussion in the Congressional hearings on the relationship between the drug traffic and interstate or foreign commerce, even if true, misses the mark. Congress could determine the existence of such a connection based on statistics and testimony showing that "[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions." H. Rep. No. 91–1444 (Part 1), 91st Cong., 2d Sess., p. 6.

In addition, as the courts in *Lopez*, *supra*, and *Scales*, *supra*, pointed out, Congress was well aware of the testimony previously before it with respect to amphetamines, barbiturates, and other substances with potential for abuse, which underlay the 1965 amendments to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. (1964 ed. Supp V) 331(q), 360a. Those amendments had similarly punished transactions in such drugs without regard to a showing in any particular prosecution of an effect on interstate commerce. The testimony with respect to the drugs supported the finding, also made by Congress in the present statute, that regulation of intrastate transactions was necessary for the effective regulation of interstate transactions because it is impossible as a practical matter to distinguish the former category from the latter. The courts of appeals unanimously sustained the 1965 amendments as within the power of Congress under the Commerce Clause. *E.g.*, *White* v. *United States*, 395 F. 2d 5 (C.A. 1), certiorari denied, 393 U.S. 928; *United States* v. *Cerrito*, 413 F. 2d 1270 (C.A. 7), certiorari denied, 396 U.S. 1004; *White* v. *United States*, 399 F. 2d 813 (C.A. 8); *Deyo* v. *United States*, 396 F. 2d 595 (C.A. 9); *Whalen* v. *United States*, 398 F. 2d 286 (C.A. 8).

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It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.